

paragraph (d) of this section, the unit shall promptly notify the submitter.

(h) *When notice is not required.* The notice requirements of this section shall not apply if:

(1) The Department determines that the information should not be disclosed;

(2) The information has been published or has been officially made available to the public;

(3) Disclosure of the information is required by law (other than 5 U.S.C. 552);

(4) The disclosure is required by an agency rule which: (i) was adopted pursuant to notice and public comment; (ii) specifies narrow classes of records submitted to the agency that are to be released under the Freedom of Information Act; and (iii) provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is submitted or a reasonable time thereafter, that disclosure of the information could reasonably be expected to cause substantial competitive harm; or

(5) The designation made by the submitter of confidential commercial or financial information appears obviously frivolous, except that the Department must provide the submitter with written notice of any final administrative disclosure determination 7 working days prior to the specified disclosure date.

[53 FR 6972, Mar. 4, 1988; 53 FR 16057, May 5, 1988]

#### **§ 4.8 Appeals from initial determinations or untimely delays.**

(a) When a request for records has been initially denied in whole or in part, or has not been timely determined, or when a requester has received an adverse initial determination regarding any other matter under this regulation, the requester may submit a written appeal within thirty calendar days after the date of the written denial or, if there has been no determination, on the last day of the applicable time limit. The appeal shall include a copy of the original request, the initial denial, if any, and a statement of the reasons why the records requested should be made available and why the initial denial, if any, was in error. No

opportunity for personal appearance, oral argument or hearing on appeal is provided.

(b) An appeal shall be addressed to the Assistant General Counsel for Administration, Department of Commerce, Room 5882, 14th and Constitution Avenue NW., Washington, DC 20230. Both the appeal envelope and the letter shall be clearly marked "Freedom of Information Appeal." An appeal not addressed and marked as provided herein will be so marked by Department personnel when it is so identified, and will be forwarded immediately to the Assistant General Counsel for Administration. An appeal incorrectly addressed will not be deemed to have been "received" for purposes of the time period for appeal set forth in 5 U.S.C. 552(a)(6), until the earlier of the time that forwarding to the Assistant General Counsel for Administration has been effected; or such forwarding would have been effected with the exercise of due diligence by Department personnel. In each instance when an appeal is so forwarded, the Office of the Assistant General Counsel for Administration shall notify the requester that the appeal was improperly addressed and of the date the appeal was received by the office. All appeals shall be decided by the Assistant General Counsel for Administration with the exception of appeals for records which were initially denied by the Assistant General Counsel for Administration. Appeals initially denied by the Assistant General Counsel for Administration shall be decided by the General Counsel at the address listed in this paragraph.

(c) The Assistant General Counsel for Administration shall make a determination on an appeal within twenty days (excluding Saturdays, Sundays and legal public holidays) of its receipt, unless an extension of time is taken in unusual circumstances, when the time for action may be extended up to ten days (excluding Saturdays, Sundays and legal public holidays) minus any days of extension granted at the initial request level. A notice of such extension shall be sent to the requester, setting forth the reasons and the date on which a determination of the appeal is expected to be sent. As

used in this paragraph, “unusual circumstances” are defined in § 4.6(b)(2).

(d) If a decision on appeal is to make the records available to the requester in part or whole, such records shall be promptly made available as provided in § 4.6.

(e) If no determination of an appeal has been sent to the requester within the twenty day period or the last extension thereof, the requester is deemed to have exhausted his administrative remedies with respect to such request, giving rise to a right of judicial review as specified in 5 U.S.C. 552(a)(6)(C). When no determination can be sent to the requester within the time limit, the Assistant General Counsel for Administration shall nonetheless exercise due diligence in continuing to process the appeal. When the time limit expires, the requester shall be informed of the reason for the delay, of the date when a determination may be expected to be made, and of his right to seek judicial review. The requester may be asked to forego judicial review until the appeal is determined.

(f) A determination on appeal shall be in writing and, when it denies records in whole or in part, the notice to the requester shall include:

(1) Identification of the specific exemption or exemptions of the Act authorizing the withholding, a brief explanation of how the exemption applies, and, when relevant, a statement as to why a discretionary release is not appropriate;

(2) A statement that the decision is final for the Department;

(3) Advice that judicial review of the denial is available in the district in which the requester resides or has his principal place of business, the district in which the agency records are located, or the District of Columbia; and

(4) The names and titles or positions of each official responsible for the denial of the appeal.

(g) The Assistant General Counsel for Administration shall send a copy of each determination on appeal to the central public reference facility referred to in § 4.4(c) where it will be indexed and kept available for public inspection and copying.

[53 FR 6972, Mar. 4, 1988; 53 FR 16058, May 5, 1988, as amended at 57 FR 28781, June 29, 1992]

#### § 4.9 Fees.

(a) *Definitions.* The following definitions are applicable to this section.

(1) The term “direct costs” means those expenditures which an agency actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space, and heating or lighting the facility in which the records are stored.

(2) The term “search” includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. Such activity should be distinguished, however, from “review” of material in order to determine whether the material is exempt from disclosure (see paragraph (a)(4) of this section). Searches may be done manually or by computer using existing programming.

(3) The term “duplication” refers to the process of making a copy of a document necessary to respond to a FOIA request. Such copies can take the form of paper copy, microform, audio-visual materials, or machine readable documentation (e.g., magnetic tape or disk), among others. The copy provided must be in a form that is reasonably usable by requesters.

(4) The term “review” refers to the process of examining documents located in response to a request that is for a commercial use (see paragraph (a)(5) of this section) to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, e.g., doing all that is necessary to excise them and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(5) The term “commercial use request” refers to a request from or on behalf of one who seeks information for